Supreme Court, U.S.
FILED
MAY 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 89-1655

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1989

**LARRY PHILLIPS**
Petitioner

-vs-

**STATE OF OHIO**
Respondent

On Petition for Writ of Certiorari
To The Ninth District Court of Appeals
For Summit County, Ohio

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# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## STATEMENT OF THE CASE

The Summit County Grand Jury indicted the Petitioner on One Count of Murder, O.R.C. 2903.02, a special felony, with a firearm specification, O.R.C. 2941.141, and Three Counts of Receiving Stolen Property, O.R.C. 2913.51, felonies of the fourth degree.

On December 5, 1988, the Three Counts of Receiving Stolen Property were dismissed and a jury trial concerning the Count of Murder ensued.

On December 12, 1988, the jury found the Petitioner guilty of Murder with the firearm specification. The Court sentenced the Petitioner to fifteen (15) years to life on the Murder charge and three (3) years on the firearm specification. The sentences were ordered to be served consecutively.

The Petitioner appealed his conviction to the Ninth District Court of Appeals which affirmed Petitioner's conviction. The Ohio Supreme Court overruled Petitioner's motion for jurisdiction on January 24, 1990. The Petitioner now seeks a Petition for a Writ of Certiorari from this Court.

## STATEMENT OF THE FACTS

In May or June of 1988, Renitta Bushner and her sister, Arlina Kay Ford, drove to the Petitioner's business, Leland's Dairy, and parked the car in the parking lot. Renitta Bushner was the Petitioner's girlfriend of three years. The women exited the car and entered the Petitioner's apartment at 862 Copley Road, Akron, Summit County, Ohio. Ms. Bushner used a key in her possession to open the Petitioner's door and the women entered the apartment. The Petitioner came out of the apartment's only bedroom to talk to the women. The Petitioner became angry at Ms. Bushner, pulled out a pistol, placed it to Ms. Bushner's head, and said he was going to "blow" her brains out. Ms. Ford told Ms. Bushner she had to go and the women left the apartment.

On August 6, 1988, Ms. Bushner, Ms. Ford, and another woman stopped at the Petitioner's apartment. They parked at Leland's Dairy and Ms. Bushner and Ms. Ford went to the apartment. Ms. Bushner used her key to gain access to the apartment. The Petitioner and his son, Leland Phillips, were present. Ms. Ford went to use the restroom and Leland left. Ms. Ford then went into the kitchen, where a conversation between the Petitioner and Ms. Bushner was in progress. The Petitioner picked up a gun from a kitchen cabinet, placed it to Ms. Bushner's head, and reminded her of his previous threat to "blow" her brains out. Ms. Bushner turned and the women left the apartment.

On August 7, 1988, at about 8:00 p.m., the Petitioner and Susie Overstreet went to a bar in Cleveland. They returned to the Petitioner's

apartment after midnight. They found the Petitioner's son, Leland, asleep on the couch. Without awaking the boy, the couple entered the bedroom. The Petitioner and Ms. Overstreet removed their outer garments and laid on the bed smoking marijuana and watching pornographic films.

In the early morning hours of August 8, 1988, Renitta Bushner entered the Petitioner's apartment, using the key she had in her possession. She headed toward the bedroom. Ms. Bushner looked into the bedroom, saw the semi-nude couple on the bed, and closed the door. After seeing Ms. Bushner, the Petitioner and Ms. Overstreet jumped to the door and held it shut as Ms. Bushner attempted to reopen it. The Petitioner went into the hallway. Ms. Overstreet heard what sounded like a scuffle and the Petitioner reentered the bedroom.

The Petitioner told Ms. Overstreet that Ms. Bushner had a knife and was trying to stab him. The Petitioner went to a dresser, pulled out a gun, opened the door, and went out. The Petitioner backed into the bedroom and with the gun pointed at the floor fired it. Up to this point, Ms. Overstreet had seen Ms. Bushner only once, when Ms. Bushner had first looked into the bedroom. Ms. Overstreet never saw Ms. Bushner with a knife.

Ms. Overstreet looked out the bedroom door and saw Ms. Bushner lying on her left side with her legs curled up. Ms. Overstreet telephoned the ambulance from the bedroom. Ms. Overstreet then went to leave the apartment but the Petitioner told her to stay. Leland and Ms. Overstreet sat in the living room to wait for the authorities, leaving the Petitioner alone with Ms. Bushner. The

Petitioner called Ms. Overstreet into the kitchen. The Petitioner had moved Ms. Bushner's body. When Ms. Overstreet entered the kitchen she saw the Petitioner pick up a knife out of the sink. The Petitioner asked Ms. Overstreet what he should do with the knife. The Petitioner laid the knife next to Ms. Bushner's leg.

Officer Clifton B. Gray, Officer Beth James, Officer Lionel S. Millender, and Detective Clifton B. Gray, all of the Akron Police Department, responded to the call and went to the Petitioner's apartment. The Petitioner told the officers he had shot Ms. Bushner, repeating it several times. The officers took the Petitioner into custody.

ARGUMENTS WHY WRIT SHOULD NOT BE ALLOWED.

I. AN APPELLATE COURT WILL NOT CONSIDER AN ERROR WAIVED AT THE TRIAL LEVEL UNLESS THE PETITIONER ESTABLISHES PLAIN ERROR.

II. AN APPELLATE COURT WILL NOT REVERSE A JURY'S VERDICT WHICH IS NOT CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND IS BASED UPON SUFFICIENT EVIDENCE.

## ARGUMENT I

I. AN APPELLATE COURT WILL NOT CONSIDER AN ERROR WAIVED AT THE TRIAL LEVEL UNLESS THE PETITIONER ESTABLISHES PLAIN ERROR.

The Petitioner claims the trial court committed plain error in failing to give a jury instruction that he had no duty to retreat in his own home. Although the State admits this instruction may have been helpful to the jury, the error did not prejudice the Petitioner and does not amount to plain error.

First, the State notes the Petitioner did not object to the trial court's instructions on the duty to retreat or request a special instruction. The general rule is that an Appellate Court will not consider any assigned error which could have been, but was not, called to the trial court's attention while such error was still avoidable or correctable. State v. Williams, 51 Ohio

St. 2d 112 (1977). The Petitioner's failure to give the trial court notice of the error in the instruction places a high burden on the Petitioner to show that, but for the error, the outcome of the trial clearly would have been otherwise. State v. Long, 53 Ohio St. 2d 91 (1978). The plain error rule is to be applied with utmost caution and used only in those exceptional circumstances where the plain error rule is necessary to prevent a manifest miscarriage of justice. State v. Underwood, 3 Ohio St. 3d 12 (1983); State v. Long, supra; State v. Carter, 23 Ohio App. 3d 27 (1985).

The State first contends the evidence presented by the Petitioner failed to establish that the Petitioner was in imminent danger of death or great bodily harm from Ms. Bushner and a jury instruction on self-defense should not

have been given. In State v. Jackson, 22 Ohio St. 3d 281 (1986), the Ohio Supreme Court addressed the issue of the duty to retreat in a similar case:

> The trial court instead gave a correct general instruction on self-defense in accordance with the elements enumerated in Robbins supra. Appellant contends this was error because the trial court, in overruling his proposed instruction, failed to sua sponte specially instruct the jury that he had no duty to retreat when attacked in or about his home.
>
> In State v. Guster (1981), 66 Ohio St. 2d 266, 271 [20 O.O.3d 249], this court stated that "*** a court's instructions to the jury should be addressed to the actual issues in the case as posited by the evidence and the pleadings." In the case sub judice, a special instruction on appellant's duty to retreat when attacked in or about his home may have been helpful to the jury. Our review of the record, however, convinces us that the omission of such an instruction was not prejudicial error requiring reversal under the facts of this case.

> As made clear by this court in Robbins, supra the elements of self-defense are cumulative. In order to prevail on the issue of self-defense, the accused must show that he was not at fault in starting the affray, and that he had a bona fide belief that he faced imminent danger of death or great bodily harm and that his only means of escape was the use of such force, and that he violated no duty to retreat or avoid the danger. If the defendant fails to prove any one of these elements by a preponderance of the evidence he has failed to demonstrate that he acted in self-defense.
>
> Id. at 284.

In Jackson the court concluded that any error in the trial court's instruction to the jury on self-defense did not prejudice the defendant as he failed to establish the element of imminent danger by a preponderance of the evidence. Id. at 285.

In the case at bar, the trial court's instruction on self-defense did not prejudice the Petitioner since the

Petitioner did not establish the other elements of self-defense. The State contends the Petitioner's testimony on self-defense is not credible based on the physical and medical evidence in this case. The Petitioner's version of the facts was contradicted by the testimony of an eyewitness and the Coroner. Dr. William Cox testified that the physical evidence and surrounding circumstances show Ms. Bushner had to be lying on the ground and the Petitioner had to be standing over her head when he shot her in order for the bullet to take the head to foot path it took once it entered her skull. This testimony was supported by the eyewitness testimony of Ms. Overstreet. The testimony of Ms. Overstreet was that the Petitioner was pointing at the ground when he fired the gun. Further, the Petitioner claimed Ms. Bushner attacked him with a knife.

However, Ms. Overstreet, a disinterested eyewitness, saw the Petitioner take the knife from the kitchen sink and place it by Ms. Bushner's leg shortly after the murder was committed. The Petitioner's fingerprint was found on the knife.

The record supports the State's contention that Ms. Bushner did not place the Petitioner in fear of imminent danger of death or great bodily harm as Ms. Bushner did not have any weapon and was lying on the floor when shot. At trial the Petitioner bears the burden of establishing the elements of self-defense by a preponderance of the evidence. State v. Robbins, 58 Ohio St. 2d 74 (1979). Further, the Petitioner's failure to notify the trial court of the error in the instruction places a high burden on the Petitioner to show that, but for the error, the outcome of the trial would clearly have been different.

State v. Long, supra. The Petitioner has failed to establish he was in fear of imminent danger of death or great bodily harm. Therefore, the State contends the Petitioner has failed to establish that, but for the error in the jury instruction on the duty to retreat, the jury would have found self-defense and returned a judgment of an acquittal.

Based on the foregoing arguments, the State contends the Petitioner has failed to establish plain error. His claims are without merit and his petition should be denied.

## ARGUMENT II

II. AN APPELLATE COURT WILL NOT REVERSE A JURY'S VERDICT WHICH IS NOT CONTRARY TO THE MANIFEST WEIGHT OF THE EVIDENCE AND IS BASED UPON SUFFICIENT EVIDENCE.

The Petitioner contends that his conviction for Murder, Ohio Revised Code Section 2903.02, was contrary to the manifest weight of the evidence. The State submits that the Petitioner is asking this court to retry issues of fact. It is a well settled proposition of law in Ohio that Appellate Courts will not perform this function. The Petitioner's contention is without merit and should be dismissed.

In State v. Martin, 22 Ohio App. 3d 172 (1983), the court set forth the following test in determining whether the jury's verdict was against the manifest weight of the evidence:

> In considering the claim that the conviction was against the manifest weight of

> the evidence, the test is much broader. The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.

The Petitioner asserts that his conviction for the murder of Renitta Bushner was clearly against the manifest weight since he established the defense of self-defense. A verdict supported by some evidence going to the essential elements of the crime will not be reversed as against the manifest weight of the evidence. C.E. Morris Co. v. Foley Construction, 54 Ohio St. 2d 279 (1978).

Ohio Revised Code Section 2903.02 sent forth the following elements of murder:

> (A) No person shall purposely cause the death of another.
>
> (B) Whoever violates this section is guilty of murder, and shall be punished as provided in section 2929.02 of the Revised Code.

In State v. Robbins, 58 Ohio St. 2d 74, 79 (1979), the court set forth the elements of self-defense:

> (1) The slayer was not at fault in creating the situation giving rise to the affray, ***(2) the slayer has a bona fide belief that he was in imminent danger of death or great bodily harm and that his only means of escape from such danger was in the use of such force, ***(3) the slayer must not have violated any duty to retreat or avoid the danger, ***." (citations omitted.)

In the case at bar, The Petitioner had twice previously threatened Ms. Bushner with a gun. Medical and eyewitness testimony established that

when the Petitioner shot Ms. Bushner she was lying on the floor and the Petitioner stood over her head and aimed downward when he shot her. Testimony also showed Ms. Bushner had no weapon when the Petitioner shot her and that the Petitioner placed a knife next to Ms. Bushner's body after he shot her. Based on the evidence and testimony the jury saw and heard, it found the Petitioner guilty of the murder of Renitta Bushner. The jury's finding is supported by the record. The Petitioner's contention that the convictions were against the manifest weight of the evidence is without merit and should be dismissed.

The Petitioner also contends the trial court should have granted his motion for acquittal. The Petitioner has waived any error regarding the trial court's ruling on his motion for

acquittal.

An accused waives his right to a directed verdict of acquittal at the close of the State's case by thereafter introducing evidence and failing to renew the motion at the close of all of the evidence. State v. Deboe, 62 Ohio App. 2d 192, 194 (1977). The Petitioner made his Criminal Rule 29(A) motion at the close of the State's case. The Petitioner presented evidence on his own behalf. He did not renew his motion upon resting his case. Therefore, the Petitioner waived his right to a directed verdict of acquittal.

Assuming arguendo that the court finds the Petitioner did not waive his Criminal Rule 29(A) motion, the State submits that it presented substantial and credible evidence from which the jury could reasonably conclude that the Petitioner committed Murder in violation

of Ohio Revised Code Section 2903.02. The Court properly overruled the Petitioner's motion for acquittal since reasonable minds could reach different conclusions as to whether each material element of the crimes had been proven beyond a reasonable doubt. State v. Bridgeman, 55 Ohio St. 2d. 261 (1978).

The State submits that the Petitioner's conviction for murder was supported by sufficient evidence beyond a reasonable doubt. State v. Eley, 56 Ohio St. 2d 169 (1978). The Petitioner's arguments are without merit and should be dismissed.

## CONCLUSION

Based on the foregoing arguments, the Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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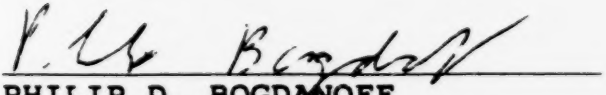

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# A P P E N D I X

## O.R.C. 2903.03 Voluntary Manslaughter

(A) No person, while under the influence of sudden passion or in a sudden fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, an aggravated felony of the first degree.

O.R.C. 2913.51 Receiving Stolen Property

(A) No person shall receive, retain, or dispose of property of another, knowing or having reasonable cause to believe that the property has been obtained through commission of a theft offense.

(B) Whoever violates this section is guilty of receiving stolen property. If the value of the property involved is less than three hundred dollars, receiving stolen property is a misdemeanor of the first degree. If the value of the property involved is three hundred dollars or more and is less than five thousand dollars, if the property involved is any of the property listed in section 2913.71 of the Revised Code, or if the offender previously has been convicted of a theft offense, receiving stolen property is a felony of the fourth degree. If the property involved is a motor vehicle, as defined in section 4501.01 of the Revised Code, if the value of the property involved is five thousand dollars or more and is less than one hundred thousand dollars, or if the offender previously has been convicted of two or more theft offenses, receiving stolen property is a felony of the third degree. If the value of the property involved is one hundred thousand dollars or more, receiving stolen property is a felony of the second degree.

O.R.C. [2941.141] Section 2941.141
[Specification that offender had a firearm while committing the offense.]

(A) Imposition of a term of actual incarceration upon an offender under division (A) of section 2929.71 of the Revised Code for having a firearm on or about his person or under his control while committing a felony is precluded unless the indictment , count in the indictment, or information charging the offense specifies that the offender did have a firearm on or about his person or under his control while committing the offense. A specification to an indictment, count in the indictment, or information charging the offender with having a firearm on or about his person on under his control while committing a felony shall be stated at the end of the body of the indictment, count, or information, and shall be in substantially the following form:

Specification (or, Specification to the First Count). The Grand Jurors (or insert the person's or the prosecuting attorney's name when appropriate) further find and specify that (set forth that the offender had a firearm on or about his person or under his control while committing the offense).

(B) As used in this section, "firearm" has the same meaning as in section 2923.11 of the Revised Code.

## Ohio Rules of Criminal Procedure
## Rule 29(A)

(A) Motion for Judgment of acquittal. The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case.